U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 09-01176

Order Denying Motion to Avoid Judicial Lien

The relief set forth on the following pages, for a total of 8 pages including this page, is hereby ORDERED.

FILED BY THE COURT
12/02/2009

US Bankruptcy Court Judge
District of South Carolina

Entered: 12/02/2009

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Lillian Jane Horne, Debtor(s).	C/A No. 09-01176-HB Chapter 7 **ORDER DENYING MOTION TO VOID JUDICIAL LIEN**

This matter is before the Court on the Motion to Void Judicial Lien ("Motion") pursuant to 11 U.S.C. § 522(f)(1)(A) filed by Lillian Jane Horne ("Debtor"). Objections to the Motion were filed by Robert Coleman d/b/a Coleman's Construction ("Coleman"), Tammy Faye Whisenant ("Whisenant") and Keith W. Yow ("Yow").

FACTS

Coleman performed significant work on Debtor's residence located at 508 Holly Street in Gaffney, South Carolina, greatly increasing the physical size and resulting in mechanic's lien rights.[1] On October 5, 2007, Coleman filed a Notice and Certificate of Mechanic's Lien attaching to Debtor's residence. Subsequently, on October 26, 2007, Coleman commenced proceedings to foreclose on Debtor's residence in state court by filing his Lis Pendens, Summons, and Complaint. Debtor responded and requested a jury trial. On January 27, 2009, the state court entered a judgment against Debtor finding that she owed Coleman $35,325.00, plus costs and interest, secured by the mechanic's lien. The judgment also ordered that Debtor's residence would be sold at foreclosure sale on March 2, 2009, in an attempt to satisfy the lien.

Debtor filed her petition for Chapter 7 relief on February 18, 2009, staying the foreclosure sale pursuant to 11 U.S.C. § 362. Debtor's original statements and schedules

[1] Counsel for Yow and Whisenant stated at the hearing that the work Coleman performed approximately doubled the square footage of Debtor's residence. Debtor did not contest this allegation.

listed the value of her home at $63,600.00 and claimed an exemption in that property, listed the obligation to Coleman as an unsecured debt, and characterized the proceeding against her home as "Consumer Litigation" that was "pending." On March 25, 2009, Debtor attended her § 341 Meeting of Creditors and testified that she was unsure why Coleman's debt was scheduled as unsecured. Debtor subsequently amended her schedules on April 1, 2009, reclassifying the debt to Coleman as a judgment lien and changing the value of her residence at $44,900.00 and changing the exemption amount to correspond to this value.

Debtor received her discharge under 11 U.S.C. § 727 on June 8, 2009,[2] and her bankruptcy case was closed. A foreclosure sale was held on August 3, 2009.[3] Coleman was the successful bidder with his credit bid of $35,325.00 plus costs of sale and fees. Yow and Whisenant purchased the bid after the sale for valuable consideration, and received a deed to the property at 508 Holly Street from the Cherokee County Clerk of Court on or about August 24, 2009.

Thereafter, on September 2, 2009, Debtor filed her Motion, asserting that Coleman's lien is voidable under § 522(f)(1)(A) of the bankruptcy code. On the same day, Debtor filed Adversary Proceeding No. 09-80144, naming Coleman, Whisenant, Yow, and the Cherokee County Clerk of Court as defendants. The Complaint is captioned "Complaint on violation of Bankruptcy Stay and Seeking Damages in Core Adversary Proceeding" and it asks this Court to find that "[t]he sale is void as having been discharged in the bankruptcy" and prays that "Debtor seeks to void the Deed, and convey the property back to Debtor, pursuant to 11 USC 105(a)."

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[2] 11 U.S.C. § 727 provides that "a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . ."

[3] This sale took place after the stay expired pursuant to 11 U.S.C. § 362(c).

This Order deals only with the "Motion to Void Judicial Lien"[4] filed in the above captioned matter. Adversary Proceeding No. 09-80144, although related to this matter, is pending and shall be handled separately.

DISCUSSION AND CONCLUSIONS OF LAW

Judicial Lien Avoidance under 11 U.S.C. § 522(f)(1)(A)

Debtor seeks to "void" Coleman's lien pursuant to the judicial lien avoidance process provided by § 522(f)(1)(A):

> (f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), *the debtor may avoid* the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--
>
> > (A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5).

(emphasis added).[5] Section 101(36) of the Bankruptcy Code defines a judicial lien as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." A debtor may avoid a judicial lien "in particular property if the debtor's interest in that property would be exempt but for the existence of the creditor's lien or interest." 4-522 Collier on Bankruptcy P 522.11. The procedure for avoiding judicial liens requires the filing of a motion in compliance with Rule 9014 to give notice and an opportunity for a hearing. Fed. R. Bankr. P. 4003(d).

In South Carolina, a mechanic's lien is not a judicial lien but rather it arises by statute. S.C. Code Ann. § 29-5-10(a) (1976). A mechanic's lien created by operation of a state statute is a statutory lien. *In re Chambers*, 264 B.R. 818, 821 (Bankr. N.D. W. Va.

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[4] Debtor's counsel filed this Motion using the court form Exhibit C to SC LBR 4003-2. These are forms with the caption "Motion to Avoid Judicial Lien (11 U.S.C. § 522(F)(1)(A))." However, counsel used the word "Void" instead of "Avoid" and altered the form language to account for the fact that the Motion was filed after the debtor's discharge and after a deed to the property was issued to a third party.

[5] Section 523(a)(5) excepts from discharge any debt resulting from a domestic support obligation.

2001); *see* 11 U.S.C. § 101(53). Therefore, it appears that the Debtor cannot avoid or void Coleman's lien under 11 U.S.C. §522(f)(1)(A) because it is not a judicial lien. *Koski v. Seattle First Nat'l Bank*, 149 B.R. 170, 177 (Bankr. D. Idaho 1992); *see also In re Wisner*, 77 B.R. 395, 397 (Bankr. N.D.N.Y. 1987) (holding that mechanic's liens survive a debtor's discharge); *see also* 4-522 Collier on Bankruptcy P 522.11.

However, Debtor asserts that the mechanic's lien became a judicial lien avoidable under § 522(f)(1)(A) as a result of enforcement of the mechanic's lien using the judicial process.[6] Like most liens created by statute, mechanic's liens must generally be perfected and further steps must be taken to realize the benefits of any such lien. *Willis v. Strother (In re Strother)*, 328 B.R. 818, 820 (B.A.P. 10th Cir. 2005). While S.C. Code Ann. § 29-5-10(a)(1976) provides the statutory mechanic's lien, South Carolina case law requires the following to perfect and enforce the lien:

> [T]he person asserting the lien (1) must serve upon the owner or person in possession and file with the register of deeds or clerk of court a notice or certificate of lien containing the lien amount, a description of the real property, and other required information "within ninety days after he ceases to labor on or furnish labor or materials for such building or structure"; (2) must commence a lawsuit seeking to enforce the lien within six months after ceasing to provide labor or materials for such real property; and (3) must file a notice of the pending action (lis pendens) within six months after ceasing to provide labor or materials for such real property.

Butler Contr., Inc. v. Court St., LLC, 369 S.C. 121, 129 (S.C. 2006).

Regardless of the perfection or enforcement procedures, "the Bankruptcy Code categorizes a lien by the way it is established, not by how it is preserved." *In re Willette*, 2008 WL 821579, at *1 (Bankr. D. Vt. 2008). A court order or judicial process used to perfect or enforce a mechanic's lien does not transform it into a judicial lien. *In re*

[6] In the response to the objections of Coleman, Yow, and Whisenant, Debtor stated she sought "to void a judgment obtained by a contractor pursuant to a mechanic's lien, SC Code 29-5-10 et seq."

Ribeiro, 7 B.R. 359, 361 (Bankr. Mass. 1980) ("[T]he mere fact that in order to enforce a lien a supplier may be required to resort to the courts does not make that lien a judicial lien."). "[T]he mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt." *Archer v. Warner*, 538 U.S. 314, 320-321 (U.S. 2003) (quoting *Brown v. Felsen*, 442 U.S. 127, 138 (U.S. 1979)).

Debtor's Motion to Void Judicial Lien pursuant to § 522(f)(1)(A) must be denied.

Laches

Even assuming that Coleman's lien could be voided by the Debtor pursuant to § 522(f)(1)(A), Coleman argues that the equitable doctrine of laches should prevent such a result.

There is no deadline for filing a motion to avoid a judicial lien, and closed cases may be reopened to permit debtors to seek avoidance of certain liens. However, such avoidance may be barred by the doctrine of laches. Laches "has been recognized as a proper ground for denying the reopening of a bankruptcy case." *In re Kean*, 207 B.R. 118, 123 (Bankr. D.S.C. 1996). "Laches is 'defined as neglect to assert [a] right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as [a] bar in [a] court of equity.'" *Id.* (quoting Black's Law Dictionary 786 (5th ed. 1979)). "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (U.S. 1961); *see also In re Paul*, 194 B.R. 381, 384 (Bankr. D.S.C. 1995). A party seeking to prove the element of prejudice must show more than just a passage of time. *In re Love*, 380 B.R. 782, 786

(Bankr. E.D. Mo. 2007); *Saucier v. Quantum Varde Asset Fund, LLC (In re Saucier)*, 353 B.R. 383, 386 (Bankr. D. Conn. 2006) ("Passage of time in itself does not constitute prejudice."). To show prejudice, the party asserting laches must show a change of position that would not have occurred absent delay on behalf of the other party in asserting a claim or defense. *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 824 (7th Cir. 1999); *see also In re Magallanez*, 403 B.R. 558, 564 (Bankr. N.D. Ill. 2009); *see also In re Hunter*, 283 B.R. 353 (Bankr. M.D. Fla. 2002); *In re Levy*, 256 B.R. 563 (Bankr. D.N.J. 2000).

The facts of this case do not explain the Debtor's lack of diligence in seeking avoidance of Coleman's lien prior to the closing of her original case and prior to completion of the sale of the property. Coleman, Whisenant, and Yow have clearly changed their positions during the delay and would be unfairly prejudiced at this late date if the Court were to rule in Debtor's favor. To do so at this point in time would require and/or result in not only the (a)voiding of a lien, but the return of compensation, the loss of bargained for benefits, the retroactive invalidation of a judicial sale, and the attempted alteration of the state real property records.[7]

Section 522(f)(1)(A) provides that a debtor "*may avoid*" the fixing of a lien, and applicable rules require proper notice and a hearing to complete that permissive task. This statute does not provide that the lien is automatically avoided if the Debtor fails to timely take advantage of this relief.

[7] Even if the Court entered an order in Debtor's favor, it is unclear that it would accomplish anything at this time due to the fact that Debtor no longer owns the property as a result of the foreclosure sale and any such order, recorded at this late date, would be out of the chain of title for the property in question.

THEREFORE, IT IS ORDERED that Debtor's Motion to Void Judicial Lien pursuant to 11 U.S.C. § 522(f)(1)(A) is denied.

AND IT IS SO ORDERED.